

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 8:03-CR-77-T-30TBM

GHASSAN ZAYED BALLUT

_____ /

**DEFENDANT GHASSAN BALLUT'S MOTION IN LIMINE
TO EXCLUDE HEARSAY STATEMENTS BY SULIMAN
ODEH AND MEMORANDUM OF LAW IN SUPPORT**

The Defendant, GHASSAN ZAYED BALLUT, by and through his undersigned counsel, hereby requests this Honorable Court to exclude from evidence in the trial of this cause certain statements attributed to one Suliman Odeh occurring on September 29, 1991, at the Islamic Concern Project (ICP) conference in Chicago, Illinois, as alleged in Overt Act 9, Count One, of the Superseding Indictment, as further described below, and as grounds therefor states:

1. Overt Act 9 of Count One alleges that "GHASSAN ZAYED BALLUT was introduced as the representative of the ICP in Chicago, Illinois."

2. Based on discovery received from the Government, it is the knowledge and belief of the Defendant and his undersigned counsel that the Government is prepared to present in evidence in the form of a videotape recording and a written translation from Arabic to English that one Suliman Odeh introduced the Defendant to a large audience of conference attendees as "the Chicago representative of the Islamic Palestine Committee."

3. The Government intends to use the recorded statement of Suliman Odeh to prove the truth of the matter asserted in the statement, namely that the Defendant was a member of the

Islamic Concern Project, and as such the statement constitutes hearsay. Fed. R. Evid. 801(c).

4. The Government recently listed Suliman Odeh as one of several dozen unindicted co-conspirators, and the Defendant anticipates that the Government is prepared to argue that Suliman Odeh's introduction of the Defendant to the audience was a statement by a co-conspirator during the course and in furtherance of the conspiracy, and therefore the introduction does not constitute hearsay, to which argument the Defendant objects. Fed. R. Evid. 801(d)(2)(E).

5. Alternatively, the Defendant anticipates that the Government is prepared to argue that Suliman Odeh's introduction of the Defendant to the audience was a statement of which the Defendant manifested an adoption or belief in its truth, and therefore the introduction does not constitute hearsay, to which argument the Defendant objects. Fed. R. Evid. 801(d)(2)(B).

6. The Government should be required to establish predicate under either theory that the introduction by Suliman Odeh did not constitute hearsay and is otherwise admissible before referring to the introduction in the Government's opening statement at trial before the jury; otherwise, the Defendant will suffer undue prejudice in violation of his right to due process.

WHEREFORE, the Defendant requests this Honorable Court to order the Government not to refer in opening statement at trial to the introduction by Suliman Odeh of the Defendant at the ICP conference in Chicago on September 29, 1991, and further to order the Government to establish the necessary predicate before presenting the same introduction in evidence during the trial of this cause.

Memorandum of Law

Hearsay is a statement, other than one made by the declarant while testifying at the trial or

hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

Hearsay is not admissible except as provided by the Rules of Evidence or by rule prescribed by the Supreme Court. Fed. R. Evid. 802. A statement is not hearsay if the statement is offered against a party and is either a statement of which the party has manifested an adoption or belief in its truth or a statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy, although the contents of the statement are not alone sufficient to establish the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered. Fed. R. Evid. 801(d)(2)(B) and (E).

The Government alleges in Overt Act 9 of Count One that “GHASSAN ZAYED BALLUT was introduced as the representative of the ICP in Chicago, Illinois.” It is the Defendant’s knowledge and belief that the Government intends to present in evidence at trial the brief introduction by Suliman Odeh of the Defendant to a large audience in an auditorium at the ICP conference in Chicago on September 29, 1991, just prior to the Defendant speaking. This introduction was recorded on videotape and was entirely in Arabic, but has been translated into English as stating that the Defendant is “the Chicago representative of the Islamic Palestine Committee.” This allegation is at issue in this cause. Because the Government seeks to introduce the statement by Suliman Odeh “to prove the truth of the matter asserted,” this statement would constitute hearsay. Presumably, the Government will argue that it is not hearsay because Suliman Odeh has been recently listed in a separate filing by the Government as an unindicted co-conspirator of the Defendant and because his introduction of the Defendant to the large audience was a statement by a co-conspirator during the course and in furtherance of the conspiracy. The Government may further argue that the Defendant manifested an adoption or belief in Suliman

Odeh's introduction.

For a declaration by one co-conspirator to be admissible against a defendant, the Government must establish by a preponderance of the evidence (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statement was made in the course of and in furtherance of the conspiracy. United States v. Miles, 290 F.3d 1341 (11th Cir. 2002). The Government has yet to establish any of these elements for the purpose of introducing this statement to prove the Defendant's affiliation with the ICP. The statement alone is not sufficient to prove the existence of the conspiracy and the participation in the conspiracy by both the declarant and the defendant. United States v. Hasner, 340 F.3d 1261, 1274-75 (11th Cir. 2003). The determination of whether a statement was made during the course and in furtherance of a conspiracy is a determination of fact. United States v. Castleberry, 116 F.3d 1384 (11th Cir. 1997). The Court has not received any evidence that would allow the Court to make the necessary factual determination for the admissibility of this statement.

Although it is not necessary for the Court to make a pretrial determination that the statement is admissible, a James hearing out of the presence of the jury is the preferred practice for determining admissibility. United States v. Espino-Perez, 798 F.2d 439 (11th Cir. 1986). Co-counsel has made a similar request for a James hearing in which the Defendant has joined. Dkts. 980, 1022. There is a serious and substantial factual issue as to each issue the Government must establish. The existence of a conspiracy and the Defendant's membership in the conspiracy are at issue, and the Defendant is unaware of any competent evidence that Suliman Odeh was a member of any conspiracy. Further, presuming the Government can establish a conspiracy and membership in the conspiracy, there is a substantial question of law and fact whether a statement

introducing a speaker knowingly made by the declarant on videotape to a large public audience consisting of many persons not alleged to be co-conspirators can be a statement “during the course and in furtherance of the conspiracy.”

During opening statements, the Government should avoid referring to evidence that is of questionable admissibility. United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). In the preset case, the Government should not be permitted to taint the deliberations of the jury with a statement that proves to be inadmissible hearsay. An order prohibiting the Government from referring to Suliman Odeh’s introduction of the Defendant in opening statement and requiring the Government to establish the necessary predicate before introducing this statement is both warranted and required by law.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on June 2, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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